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No. 07-582

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., *et al.*,
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

BRIEF FOR RESPONDENT FOX TELEVISION STATIONS, INC.

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QUESTION PRESENTED

Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. § 1464; see 47 C.F.R. § 73.3999, when the expletives are not repeated.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Fox Television Stations, Inc. states that it is a wholly-owned subsidiary of News Corporation, a publicly-traded company. No entity holds 10 percent or more of News Corporation's stock.

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INTRODUCTION

For almost 30 years following this Court's "emphatically narrow" ruling in *Pacifica*, see *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 127 (1989), the FCC "strictly . . . observe[d] the narrowness of the *Pacifica* holding," *WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1254, ¶ 10 (1978), and it punished only isolated and fleeting utterances in those rare cases that were egregious and shocking. In 2004, however, the FCC abruptly abandoned the restraint that previous Commissions accepted as constitutionally required, embarking on a regime of draconian enforcement and multimillion dollar fines against the broadcast of even isolated and fleeting expletives. The new regime unsettled broadcasters' expectations, chilled spontaneous programming and threatened the viability of live television.

The Second Circuit correctly concluded that the FCC had not provided an adequate explanation under the Administrative Procedure Act ("APA") for this change in policy and remanded the matter to the agency. The court of appeals also noted that there were serious First Amendment objections to the FCC's expanded regime, and it expressed its opinion that the FCC very likely will have difficulty on remand articulating a standard that both departs from *Pacifica* and still remains consistent with the First Amendment.

Rather than asking for rehearing en banc or opting to provide a better explanation for the FCC's change in policy, petitioners came directly to this Court asking for review of the Second Circuit's decision. In the petition for certiorari, they argued that this case was important enough to warrant this Court's attention because the court of appeals already had

suggested that the FCC could not "adequately respond to the constitutional . . . challenges" raised below. Pet. Cert. Reply 3 (quoting Pet. App. 45a). Now that this Court has granted certiorari, however, petitioners insist that this Court should treat this case as a pure administrative law case and, in essence, act as if there are no constitutional issues implicated by the FCC's new policy. Petitioners' approach would place the Court in the curious position of issuing a decision that neither disposes of this case nor provides any meaningful guidance in any future case. If the policy is ultimately declared unconstitutional, an opinion from this Court finding that the FCC could have adopted the policy under the APA would be academic. Nor would the opinion have any continuing significance in administrative law: petitioners concede that "[a]s this case comes to this Court it turns on the application of well-settled principles of administrative law." Pet. Br. 20.

Having invoked this Court's jurisdiction, however, petitioners cannot evade the fundamental administrative deficiencies in the FCC's new indecency regime and the constitutional problems that pervade it. Even if this is viewed as an "administrative law" case, the constitutional questions remain critically important to a proper consideration of the issues. The FCC's new policy is not only unexplained but unconstitutional, and the Second Circuit should be affirmed.

STATEMENT OF THE CASE

1. The FCC's indecency regime enforces 18 U.S.C. § 1464, which provides:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall

> be fined under this title or imprisoned not more than two years, or both.

Pet. App. 145a.[1]

The FCC's approach to its regulation of speech under the "indecency" standard for decades was characterized by a cautious and limited enforcement policy that paid serious respect to the First Amendment interests of broadcasters. For several decades, the FCC enforced § 1464 only in the context of license renewal applications. See 47 U.S.C. § 312. The FCC made clear that it could take action only in the most extreme cases, involving extensive violations repeated over a long period of time.[2]

When the FCC first began to exercise its forfeiture power to enforce § 1464 in the mid-1970's, the agency continued to observe a restrained enforcement policy. In 1975, the FCC considered a complaint concerning a broadcast of comedian George Carlin's "Filthy Words" monologue. *Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94 (1975) ("*FCC Pacifica Order*"). During his 12-minute monologue—broadcast at 2:00 in the afternoon—Carlin repeatedly used "fuck" and "shit" "in a variety of colloquialisms." See *FCC* v. *Pacifica Found.*, 438 U.S. 726, 729 (1978) (plurality opinion); see also *id.* at 751-55 (transcript of monologue). The FCC issued a declaratory order defining indecent speech as:

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[1] *See* Radio Act of 1927, ch. 169, § 29, 44 Stat. 1162, 1172-73 (original enactment); Communications Act of 1934, ch. 652, § 326, 48 Stat. 1064, 1091; Act of June 25, 1948, ch. 645, § 1464, 62 Stat. 683, 769, 866 (transferring the prohibition to the U.S. Criminal Code).

[2] *See, e.g., Robinson* v. *FCC*, 334 F.2d 534 (D.C. Cir. 1964); *Applications of E.G. Robinson*, 33 F.C.C. 250, 257, ¶ 22 (1962); *Applications of Pacifica Found.*, 36 F.C.C. 147, 150, ¶ 8 (1964).

> language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience.

FCC Pacifica Order, 56 F.C.C.2d at 97-98. Based on this definition, the FCC concluded that the broadcast was "indecent" and that the FCC could have imposed administrative sanctions against the station (although it did not). At the same time, however, the FCC clarified that, under its cautious enforcement policy, it would be "inequitable" to hold a licensee responsible for indecent language when "public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing." *Petition for Clarification or Reconsideration of a Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 59 F.C.C.2d 892, 893, ¶ 4 n.1 (1976) ("*Pacifica Reconsideration Order*").

This Court affirmed the FCC's finding that the George Carlin monologue, as broadcast over the radio in mid-afternoon, was indecent. See *Pacifica*, 438 U.S. 726. The opinion, however, was "an emphatically narrow holding," *Sable Communications*, 492 U.S. at 127, limited to the "verbal shock treatment" caused by the repeated use of expletives in the specific broadcast at issue. *Pacifica*, 438 U.S. at 757 (Powell, J., concurring). Indeed, Justices Powell and Blackmun, who supplied the crucial votes for *Pacifica*'s 5-4 majority, explained that "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word." *Id.* at 760-61 (Powell, J., concurring); see also *id.* at 750 (opinion of the Court) ("We have not

decided that an occasional expletive . . . would justify any sanction . . . ."). They stressed that the FCC does not have "unrestricted license to decide what speech, protected in other media, may be banned from the airwaves in order to protect unwilling adults from momentary exposure to it in their homes." *Id.* at 759-60 (Powell, J., concurring). Both Justices were concerned that the FCC's standard could lead broadcasters to self-censor protected speech, but they voted to uphold the FCC's order only because "the Commission may be expected to proceed cautiously, as it has in the past." *Id.* at 756, 760, 761 n.4 (Powell, J., concurring).

For several decades following *Pacifica*, the FCC repeatedly reaffirmed the limited scope of the indecency ban through a cautious and self-restrained approach to enforcement. As the FCC explained:

> We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question. The opinion of the Court specifically stated that it was not ruling that "an occasional expletive . . . would justify any sanction . . . ." Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been "repeated over and over as a sort of verbal shock treatment." . . . He specifically distinguished "the verbal shock treatment [in *Pacifica*]" from "the isolated use of a potentially offensive word in the course of a radio broadcast."

WGBH, 69 F.C.C.2d at 1254, ¶ 10 (1978). The FCC thus drew a distinction between isolated and fleeting expletives—which were not actionably indecent—and

uses of offensive language that rose to the level of "verbal shock treatment"—which were.

Significantly, throughout its post-*Pacifica* indecency enforcement actions, the FCC repeatedly held that fleeting, isolated or inadvertent expletives were not indecent. See *L.M. Commc'ns of S.C., Inc. (WYBB(FM))*, 7 FCC Rcd. 1595, 1595 (Mass Media Bureau 1992) (single utterance not indecent); *Applications of Lincoln Dellar for Renewal of the Licenses of Stations KPRL(AM) & KDDB(FM)*, 8 FCC Rcd. 2582, 2585, ¶ 26 (Audio Serv. Div. 1993) (single utterance not indecent because of "isolated and accidental nature of the broadcast").

In 1987, the FCC utilized three companion declaratory orders to articulate what it called its "generic enforcement policy" for broadcast indecency. See *Pacifica Found., Inc.*, 2 FCC Rcd. 2698 (1987), *aff'd sub nom. Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930 (1987), *aff'd in relevant part, rev'd in part sub nom. Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988); *Regents of the Univ. of Cal.*, 2 FCC Rcd. 2703 (1987) (same subsequent history); *Infinity Broad. Corp. of Pa.*, 2 FCC Rcd. 2705 (1987) (same subsequent history). In these orders, the FCC clarified that speech could be indecent without use of the specific "seven dirty words" from the George Carlin routine, as long as the speech at issue was the functional equivalent of the intentional "verbal shock treatment" in that monologue. The FCC recognized that an "analysis of whether particular speech is indecent cannot turn on a mechanistic classification of language," *Infinity Broad. Corp.*, 2 FCC Rcd. at 2705, ¶ 8, and it reaffirmed that isolated or fleeting utterances would not be considered actionable. *Id.* at 2705, ¶ 7 ("Speech that is indecent must involve more than the

isolated use of an offensive word."); *Regents of the Univ. of Cal.*, 2 FCC Rcd. at 2703, ¶ 3 (same). Indeed, these declaratory orders all involved repeated and intentional broadcasts of material that the FCC deemed to be indecent under its generic standard; none presented the question of whether non-repetitive utterances violated § 1464.[3] Thus, the FCC's adoption of the "generic" standard wrought no substantive change in its indecency enforcement policy with respect to isolated utterances.

The FCC reaffirmed its restrained approach in a 2001 policy statement, in which it announced a two-part test for assessing whether language is "indecent":

> First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be *patently offensive* as measured by contemporary community standards for the broadcast medium.

Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 FCC Rcd. 7999, 8002, ¶¶ 7-8 (2001) ("*Indecency Policy Statement*"). It identified several factors as relevant in assessing

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[3] *See, e.g.*, *Pacifica*, 2 FCC Rcd. at 2700, ¶¶ 19-22 (describing radio broadcast of excerpts from the play "The Jerker," which included repetitive uses of "shit" and "fucking" and graphic descriptions of anal sex); *Regents of the Univ. of Cal.*, 2 FCC Rcd. at 2703, ¶ 4 (quoting lyrics to song "Makin' Bacon"); *Infinity Broad. Corp.*, 2 FCC Rcd. at 2706, ¶ 11 (quoting excerpts from Howard Stern broadcasts that included, *inter alia*, discussions of testicles, penis size, and being "sodomized by Lambchop, you know that puppet Sherri Lewis holds").

whether language was "patently offensive" under the second prong:

> (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.

Id. at 8003, ¶ 10 (emphasis omitted). These factors restated in summary form the criteria the FCC had been applying all along to determine when broadcasts were, in context, so patently offensive that they were actionably indecent. In essence, the *Indecency Policy Statement* articulated the factors the FCC used to decide when an utterance amounted to "verbal shock treatment." Importantly, these factors reaffirmed that the policy on indecency would not reach merely isolated or fleeting instances of potentially objectionable language except in the most extreme and obvious cases.[4] Instead, the FCC would continue to target only those broadcasts that severely shocked the listener with offensive content. *Id.* at 8010, ¶ 20 (quoting *Pacifica*, 438 U.S. at 757 (Powell, J., concurring)).

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[4] The only examples of such fleeting but indecent references that the FCC identified in the *Indecency Policy Statement* involved graphic descriptions of intercourse with children or egregiously graphic and offensive descriptions of sexual activity, *see Indecency Policy Statement*, 16 FCC Rcd. at 8009-10, ¶ 19—*i.e.*, utterances that, even though they were not repeated, nonetheless amounted to verbal shock treatment and thus satisfied the patent offensiveness requirement.

2. In 2004, the FCC abruptly reversed course. During a live broadcast of the "Golden Globe Awards," the singer Bono declared that his receipt of an award was "really, really fucking brilliant." *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 FCC Rcd. 4975, 4976, ¶ 3 n.4 (2004) ("*Golden Globe Awards Order*"). Under longstanding precedent, this isolated and fleeting expletive clearly was not "indecent," as the FCC's Enforcement Bureau recognized in its initial ruling on the broadcast. *Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 18 FCC Rcd. 19859, 19861, ¶ 6 (Enforcement Bureau 2003). The full FCC, however, reversed the Enforcement Bureau's decision, expressly overruled previous FCC decisions to the contrary, and stressed that "[t]he fact that the use of [an indecent] word may have been unintentional is irrelevant." *Golden Globe Awards Order*, 19 FCC Rcd. at 4979, ¶ 9 (overruling prior holdings that "isolated use of expletives is not indecent" and disavowing prior statements to the contrary, including the *FCC Pacifica Order*); see also *id.* at 4980, ¶ 12 n.32 (overruling cases cited in the *Indecency Policy Statement*). The FCC understood that its action in the *Golden Globe Awards Order* was a sharp break with its longstanding restrained enforcement policy, and it therefore declined to issue a penalty for the violation because "existing precedent would have permitted this broadcast." See *id.* at 4981, ¶ 15.

The FCC's unexpected expansion of the ban on "indecency" in the *Golden Globe Awards Order* created considerable shock and uncertainty among broadcasters about the scope of the new policy. This

confusion was exacerbated by subsequent enforcement decisions that were afflicted with numerous inconsistencies. For example, the FCC found that the unedited broadcast of the movie *Saving Private Ryan* was not actionable, even though it contained numerous, repeated uses of the words "fuck" and "shit" and their variants. This ruling was based on the agency's subjective assessment that deleting such expletives would have "altered the nature of the artistic work." *Complaints Against Various Television Licensees Regarding Their Broad. on Nov. 11, 2004 of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, 20 FCC Rcd. 4507, 4513, ¶ 14 (2005) ("*Saving Private Ryan Order*"). The FCC offered no explanation for its disparate treatment of different broadcasts that used the same words, other than vague assertions that it took "context" into account.

Recognizing that its dramatic expansion of the indecency regime had created widespread confusion and uncertainty, the FCC issued an Omnibus Order in 2006 with the express goal of "provid[ing] substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard" by making findings about approximately 30 television programs with a "broad range of factual patterns." *Complaints Regarding Various Television Broads. Between Feb. 2, 2002 & Mar. 8, 2005*, 21 FCC Rcd. 2664, 2665, ¶ 2 (2006) ("*Omnibus Order*") (J.A. 27). However, the *Omnibus Order* merely made the problems facing broadcasters more acute. For example, the FCC found that the Martin Scorsese-produced documentary *The Blues: Godfathers and Sons*, in which blues musicians uttered expletives, was indecent because the agency "disagree[d] that

the use of such language was necessary to express any particular viewpoint in this case." *Id.* at 73. In its indecency analysis, the FCC made no distinction between *The Blues: Godfathers and Sons*, where the expletives were found to be unnecessary, and *Saving Private Ryan*, where the expletives were found to be "integral to the film's objective." *Saving Private Ryan Order*, 20 FCC Rcd. at 4512, ¶ 14. Broadcasters thus were left to guess whether their programming choices would be sanctionable. Not surprisingly, they have chosen to engage in self-censorship. See J.A. 251-53.

3. In the *Omnibus Order*, the FCC concluded that Fox's broadcasts of the 2002 and 2003 "Billboard Music Awards" violated § 1464. During the 2002 live broadcast, Cher received an award and spontaneously said that "People have been telling me I'm on the way out every year, right? So fuck 'em." J.A. 86. During the 2003 live broadcast, presenter Nicole Richie deviated from the script and ad-libbed, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Id.* at 91. The FCC found both broadcasts to be actionably indecent, even though the potentially offensive language in both was unscripted and it was undisputed that Fox had no knowledge or intention that the words would be broadcast. *Id.* at 88, 94. The FCC did not, however, issue notices of apparent liability against these two broadcasts for the express reason that both broadcasts pre-dated the *Golden Globe Awards Order* and were not actionable under prior precedent. *Id.* at 91, 97-98.[5]

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[5] The FCC also found uses of the word "bullshit" over several episodes of ABC's *NYPD Blue* and use of the word "bullshitter" during a live interview on CBS's *The Early Show* to be indecent. J.A. 101-03, 106-07.

Fox, along with other broadcasters, petitioned for review of the *Omnibus Order* in the Second Circuit, arguing *inter alia* that the FCC's dramatic change in its indecency policy lacked an adequate explanation and that the FCC's application of its new policy was arbitrary and capricious. The FCC sought and received a voluntary remand in return for a stay of the Commission's enforcement of its new indecency policy. On remand, the FCC reaffirmed its indecency findings against Fox's broadcasts. *Complaints Regarding Various Television Broads. Between Feb. 2., 2002 & Mar. 8, 2006*, 21 FCC Rcd. 13299, 13321, ¶ 53 (2006) ("*Remand Order*") (Pet. App. 112a-13a).[6] Surprisingly, and despite having consistently acknowledged that the *Golden Globe Awards Order* represented a sea change in its approach to indecency regulation, the FCC remarkably claimed on remand that it had never changed its indecency policy with respect to isolated and fleeting expletives. *Id.* at 79a. The FCC adopted this stance despite having explicitly acknowledged the change in the *Omnibus Order* itself. See J.A. 102 ("[I]n the *Golden Globe Awards Order*, the Commission reversed precedent that had suggested that the isolated use of an offensive word like the "F-Word" is not indecent."). The FCC also recast contrary prior precedent as mere

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[6] The FCC reversed its decision in the *Omnibus Order* with respect to *NYPD Blue* because it determined there had been no legitimate complaints from viewers in a time zone in which the program aired prior to 10 p.m. Pet. App. 130a. Regarding *The Early Show*, the FCC reversed its earlier conclusion that the use of an offensive word during a news program contributed to the indecency finding, reasoning on remand that broadcast of an offensive word during a news program actually militated *against* an indecency finding. *Id.* at 128a. At the same time, the FCC has stressed that "[t]o be sure, there is no outright news exemption from our indecency rules." Pet. App. 127a.

"staff letters and dicta," Pet. App. 79a, and even implied that the issue of isolated and fleeting expletives had been one of first impression in the *Golden Globe Awards Order*. *Id.* at 80a. The FCC also contended, for the first time, that it could have imposed a fine on Fox based on prior FCC decisions, though it chose not to. *Id.* at 113a.

4. Following the remand, the Second Circuit by a vote of 2-1 granted Fox's petition for review. In its brief on appeal, the FCC abandoned its stated position that it had not changed its indecency enforcement policy. Pet. App. 22a. Accordingly, the Second Circuit undertook to discern whether an acceptable justification existed for the reversal of course in a *Remand Order* that had refused to acknowledge any such change. The primary justification identified by the court was the FCC's "first blow" theory—the claim that even an isolated and fleeting expletive constituted an immediate "blow" to the broadcast audience that the FCC could prohibit. *Id.* at 25a. The Second Circuit rejected this rationale for several reasons. First, the FCC had provided "no reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." *Id.*

Second, and more importantly, the first blow theory made sense only if the FCC presumed that mere exposure to potentially offensive language harmed the broadcast audience. The FCC nonetheless permitted some isolated and fleeting expletives if, for example, they occurred during a "*bona fide* news interview," such as the isolated use of the word "bullshitter" in *The Early Show*. The FCC also permitted multiple uses of expletives, such as in *Saving Private Ryan*, when in the agency's judgment

the expletives (including multiple uses of the words "fuck" and "shit") were deemed "integral" to the broadcast. The FCC had not explained how it made those determinations or why such broadcasts constituted lesser "blows" that the broadcast audience should be permitted to suffer, thereby undermining the first blow theory as a justification for sanctioning some but not all fleeting expletives. Pet. App. 26a-28a. The Second Circuit also identified other purported justifications to which the *Remand Order* made "passing reference"—including, for example, the supposed difficulty of distinguishing expletives from literal descriptions of sexual or excretory functions and the FCC's fear that broadcasters would air isolated expletives at all hours of the day—but it found those rationales insufficient as well. *Id.* at 29a-31a.

After concluding that the FCC had failed to articulate a reasoned justification for the change in its indecency policy, the Second Circuit declined to rule on any of the other arguments Fox had raised. In particular, the Second Circuit did not consider Fox's statutory argument that the FCC's indecency findings were invalid because Fox did not have the requisite *scienter* required by § 1464. See Pet. App. 18a. The Second Circuit also did not rule on Fox's First Amendment claims, although it did offer some observations on these issues to guide the FCC on remand in a section expressly labeled as dicta. *Id.* at 35a-43a & n.12.

Judge Leval dissented. He too recognized that the FCC had, in fact, changed its indecency policy. Pet. App. 47a. In his view, however, the FCC had adequately explained the change with respect to the word "fuck," based on his belief that that word "conveys an inescapably sexual connotation." *Id.* at

49a. Judge Leval did not consider the FCC's policy with respect to the word "shit," although he strongly suggested that he did not consider that term to be indecent. *Id.* at 59a n.18 (reasoning that "there is an enormous difference between censorship of references to sex and censorship of references to excrement" because, "[f]or children, excrement is a main preoccupation of their early years"). And even though Judge Leval would have rejected Fox's administrative law challenges to the new indecency regime, he inexplicably declined to address Fox's statutory and constitutional challenges. *Id.* at 60a n.19.

SUMMARY OF ARGUMENT

The FCC's regulation of indecency has for decades been characterized by restraint and caution. A central feature of that restrained approach was the principle that offensive language would be deemed "indecent," and subject to sanction, only if it was intentionally repeated "over and over" or otherwise constituted in light of its context a form of "verbal shock treatment." *Pacifica*, 438 U.S. at 757 (Powell, J., concurring). Mere isolated or fleeting instances of objectionable language could rarely satisfy this standard. Thus, the FCC sought to ensure that only the most egregious and shocking broadcasts would be punished and that the First Amendment rights of broadcasters would thereby be respected.

The FCC has abandoned that restrained approach. It now holds that certain words—at least "fuck" and "shit"—are inherently indecent and subject to sanction without regard to whether they are intended and repeated. The FCC has, in short, abrogated its cautious enforcement policy and now willy nilly punishes utterances that fall far short of the "verbal shock treatment" that for decades described what was

necessary to satisfy the requirement that language be "patently offensive."

Petitioners have not explained this shift in agency policy. In the *Remand Order*, the FCC in fact denied that any change had occurred, asserting instead that isolated and fleeting expletives have always satisfied the definition of "indecent," notwithstanding prior FCC holdings to the contrary. Under *Chenery*, that should be the end of the matter because to suggest that there has been no shift in approach by the FCC is utterly insupportable. See *CBS Corp.* v. *FCC*, No. 06-3575, 2008 WL 2789307, at *12 (3d Cir. July 21, 2008). Petitioners at least acknowledge to this Court that a change has occurred, but they continue to mischaracterize the new policy as merely taking greater account of "context." They neither address nor attempt to justify the actual change in policy regarding fleeting and isolated expletives.

None of the reasons offered by petitioners in support of the *Remand Order* bears a rational connection to the agency's actual policy shift. *First*, the supposed need to take greater account of "context" cannot justify the new policy because the old policy already treated context as a critical consideration in assessing indecency. *Second*, the purported need to protect children from even the "first blow" of offensive language cannot support the FCC's current *ad hoc* approach, which prohibits expletives in certain broadcasts (*The Billboard Music Awards*) but permits them in numerous others (*Saving Private Ryan*). *Third*, although petitioners argue that the FCC's prior enforcement approach granted broadcasters a "blanket exemption," allowing them to broadcast isolated expletives throughout the day without repercussion, there is no evidence that broadcasters abused the latitude embodied in this

purported "exemption." Nor is there any record basis for predicting that broadcasters would change their decades-long restraint in airing expletives. In short, nothing in the agency's order or in petitioners' *post hoc* effort to defend the new FCC approach explains the Commission's decision to abandon its decades-long restrained reaction to fleeting and isolated expletives in favor of a presumptively unforgiving understanding of what words are, in context, "indecent."

The agency's failure to offer *any* reasonable explanation for its policy shift is even more egregious in light of the significant constitutional issues involved. While petitioners would have the Court ignore those issues, the regulation of "indecent" speech necessarily implicates core First Amendment values, and the administrative law analysis simply cannot be divorced from the constitutional one. A change in policy that results in the restriction of a greater amount of speech—as the change in this case undoubtedly does—must be justified not only by a "reasoned explanation," *Massachusetts* v. *EPA*, 127 S. Ct. 1438, 1463 (2007), but also by proof that the policy represents the "least restrictive" means to address a real, established harm, *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 811-15 (2000); *Indecency Policy Statement*, 16 FCC Rcd. at 8000, ¶ 3. The FCC has not offered any such proof, and its misguided pleas for agency deference cannot be reconciled with the constitutional problems posed by the FCC's new regime.

Indeed, as the Second Circuit suggested in dicta, the FCC's expanded policy is unconstitutional. In the 30 years since *Pacifica*, legal and technological developments have eroded the underpinnings of the *Pacifica* decision, which make an expansion of the

indecency regime especially suspect. Moreover, the recent development of filtering technologies, such as the V-Chip, gives consumers and parents the ability to block objectionable materials from their televisions, rendering FCC regulation of indecency unnecessary. Finally, recent decisions of this Court have made clear that the FCC's test for indecency is overbroad and unconstitutionally vague. See *Reno* v. *ACLU*, 521 U.S. 844, 874 (1997).

The Second Circuit was correct in holding that the FCC failed utterly to offer a rational explanation for its change in policy It pointed to the profoundly chilling effect of the FCC's new regime—especially for live television—and it correctly observed that the FCC's approach to regulating broadcast indecency likely contravenes the First Amendment. The judgment of the court of appeals should be affirmed.

ARGUMENT

I. THE COMMISSION DID NOT GIVE A REASONED EXPLANATION FOR ITS CHANGE IN POLICY.

Agency action will be set aside as "arbitrary and capricious" under the Administrative Procedure Act ("APA") if the agency does not provide a "reasoned explanation" for its judgment. *Massachusetts* v. *EPA*, 127 S. Ct. at 1463. The agency must consider the relevant statutory factors, assess the available evidence, examine the ramifications of its decision, and "articulate a satisfactory explanation for the action[,] including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency order that does not provide a reasoned explanation for a change in policy must be vacated, notwithstanding any *post*

hoc efforts to justify the decision. *Massachusetts* v. *EPA*, 127 S. Ct. at 1463; see also *State Farm*, 463 U.S. at 50 ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action. It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.") (citing, *inter alia*, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947)). And, although an agency normally receives *Chevron* deference for its statutory interpretations and policy judgments,[7] here the FCC is entitled to no deference because its indecency regime poses grave constitutional issues. *Sable Communications*, 492 U.S. at 129. Simply put, the First Amendment trumps *Chevron*.

Petitioners concede that the FCC gave only three reasons to support its policy: (1) it replaces a purportedly *per se* rule with a contextual, case-by-case approach to fleeting expletives; (2) it protects listeners from the supposed "first blow" of potentially offensive words; and (3) it prevents the mythical risk that broadcasters would air isolated expletives more frequently. Pet. Br. 23-26. As explained below, however, petitioners continue to misstate the issue in this case. There was never a *per se* rule against liability for isolated expletives; the FCC's contextual approach that followed from *Pacifica* required that an utterance, whether repeated or not, constitute "verbal shock treatment." The FCC has now changed that standard without even frankly acknowledging the change, much less providing an adequate justification for it. Indeed, its only rationale that is even relevant to the actual change in policy is its stated goal of shielding children from ever hearing these words at

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[7] *See Chevron U.S.A., Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

all (*i.e.*, the "first blow" theory), but as the Second Circuit correctly held, this makes no sense as an explanation for the change, given that the FCC permits these words to be broadcast in a wide range of contexts.

Petitioners' other attacks on the Second Circuit's decision are equally meritless. This Court's precedents make clear that the FCC must explain what harms its new policy is meant to address, and the Second Circuit correctly held that the FCC had fallen far short of what both the First Amendment and the APA require. Similarly, the Second Circuit's criticism of whether any change in policy should be based on an asserted difficulty in distinguishing literal from non-literal uses of the words at issue was correct.

A. The FCC's Interpretation Of "Indecent" Under 18 U.S.C. § 1464 Is Not Entitled To Deference.

Petitioners ask this Court to treat this case like an ordinary administrative law case, and much of their argument is based on a plea for deference to agency judgment. See Pet. Br. 20 ("As this case comes to this Court it turns on the application of well-settled principles of administrative law"). They insist that courts are ill-equipped to assess the policy considerations underlying the concept of "indecent" under 18 U.S.C. § 1464, even though the FCC itself has not relied on any empirical evidence or research but only its own sense of what is indecent. See, *e.g.*, Pet. Br. 21-22, 39-40 (arguing that change in policy need not be supported by empirical evidence); Pet. App. 86a ("[I]n evaluating material, we rely on the Commission's collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest

groups, and ordinary citizens." (citation and internal quotation marks omitted)).

But this is not a run-of-the-mill administrative law case. The 800-pound gorilla in the corner of the room that petitioners choose to ignore is the First Amendment. The agency rule at issue here is not an economic regulation of widget manufacturing; it is a content-based restriction on protected speech. See *Playboy*, 529 U.S. at 811-12 ("indecent" speech is fully protected under the First Amendment); *Sable Communications*, 492 U.S. at 126 (same). The FCC's new policy prohibits substantially more protected speech than the old policy, and therefore deference must give way to a searching constitutional review of the new rules. Indeed, as explained in Section II below, there are serious constitutional objections to the FCC's regulation of indecency at all—objections that are far more serious today than they were in the 1970's when this Court decided *Pacifica*. Therefore, even if petitioners insist on framing their case as purely a matter of administrative law, it nonetheless would be improper even within this framework simply to assume that the substantial constitutional objections to the indecency enforcement regime did not exist, or that those constitutional issues do not undermine the FCC's claim to deference when it expands the scope of its indecency regime.

This Court has long recognized that, when a statute can reasonably be interpreted in either of two ways, one of which would raise serious constitutional doubts, the alternative interpretation *must* be adopted. *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("This cardinal principle . . . has for so long been applied by this Court that it is beyond debate."). It follows that, in cases implicating

significant constitutional concerns, an agency loses its freedom under *Chevron* to choose among all potentially "reasonable" methods of implementing a statute, but rather must select the most narrow permissible construction, to avoid any unnecessary conflict with the Constitution. *DeBartolo*, 485 U.S. at 575; cf. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). For this reason, traditional principles of agency deference simply have no place in a case such as this that presents serious constitutional questions. *Id.*[8]

In fact, deference to the FCC would be unwarranted in this case even under "standard" principles of administrative law. An agency's interpretation of a statute is accorded deference only when the agency has been granted exclusive responsibility for administering that provision. *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990); *Dunn* v. *CFTC*, 519 U.S. 465, 479 n.14 (1997). But the statute at issue here, 18 U.S.C. § 1464, is a *criminal* provision. The FCC does not administer § 1464 exclusively; to the contrary, primary responsibility for enforcing criminal provisions lies with the Department of Justice. See 28 U.S.C. §§ 516, 547; see *Indecency Policy Statement*, 16 FCC Rcd. at 7999-8000, ¶ 2 n.2. And, moreover, this Court consistently has declined to defer to agency judgments regarding the interpretation of criminal statutes, even when the agency plays a role in their administration. *Gonzales*

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[8] *See also Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173-74 (2001) (deference is inappropriate when the agency's interpretation raises "significant constitutional questions"); *Miller* v. *Johnson*, 515 U.S. 900, 923 (1995) ("[W]e have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions.").

v. *Oregon*, 546 U.S. 243, 264 (2006); see also *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in judgment).

In short, it would be difficult to find a situation when an agency has less of a claim to deference or more of a need for it, given its abrupt departure from prior precedent. But at the end of the day, the FCC must show that its indecency regime is permissible without the benefit of *Chevron* to support it.

B. The Change In Policy At Issue Has Nothing To Do With "Context" But Is A Substantive Modification Of The Definition Of "Indecent" Under 18 U.S.C. § 1464 That The FCC Has Failed To Explain.

Petitioners argue that the FCC's indecency policy has been changed merely to allow the FCC to take account of "context" when considering isolated expletives, supposedly to "harmonize" the FCC's consideration of such expletives with an overall approach to indecency that involves contextual judgments. *E.g.*, Pet. Br. 20-21, 23-24. But that is not what has happened at all. The FCC always considered "context" under the prior policy, even when considering words that were not repeated. The issue under the prior policy, however, was always whether, in context, the utterances were graphic, shocking, and egregious. What has changed is the substantive standard for what is indecent: the FCC's new policy punishes a wide range of speech that falls far short of "verbal shock treatment" by presuming that certain words, even in isolation, are indecent absent mitigating circumstances. And the FCC has yet to explain *that* change.

1. Context has always been a critical component of the FCC's stated indecency standard. The Commission's prior policy defined broadcast expletives as "indecent" only in egregious cases that were patently offensive. See *Indecency Policy Statement*, 16 FCC Rcd. at 8010, ¶ 20; *Citadel Broad. Co.*, 17 FCC Rcd. 483 (2002); *WGBH*, 69 F.C.C.2d at 1254, ¶ 10. To determine whether this standard was met, the FCC would look to the context in which the expletive was used and evaluate it in light of the *Indecency Policy Statement*'s articulated criteria: whether it was graphic and explicit, whether it was repeated or dwelled on sexual or excretory organs or activities, and whether it was pandering, titillating or shocking. *Indecency Policy Statement*, 16 FCC Rcd. at 8008-10, ¶¶ 17-20; see also *Peter Branton*, 6 FCC Rcd. 610 (1991); *Pacifica*, 2 FCC Rcd. at 2698-700, ¶¶ 8-16; *WGBH*, 69 F.C.C.2d at 1251, ¶¶ 5-7. Only if the language *in context* shocked the listener with offensive speech would it be deemed indecent. *Indecency Policy Statement*, 16 FCC Rcd. at 8008-10, ¶¶ 17-20.[9]

The FCC's approach flowed directly from *Pacifica*. The pivotal concurring Justices in that case found that the monologue at issue (George Carlin's "Filthy Words") could be classified as "indecent" only because "the language employed is . . . vulgar and offensive . . . [and] was repeated over and over as a sort of verbal shock treatment." 438 U.S. at 757 (Powell, J., concurring). Respecting the narrowness

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[9] *See also Indecency Policy Statement*, 16 FCC Rcd. at 8002, ¶ 9 ("In determining whether material is patently offensive, the full context in which the material appeared is critically important."); *Infinity Broad. Corp.*, 2 FCC Rcd. at 2705, ¶ 7 ("[W]hat is indecent is 'largely a function of context' . . . .") (quoting *Pacifica*, 438 U.S. at 742).

of the *Pacifica* decision, the FCC thus adopted a standard that ensured that potentially offensive utterances would not be indecent unless they rose to the level of "verbal shock treatment." *Indecency Policy Statement*, 16 FCC Rcd. at 8010, ¶ 20; see also *Pacifica*, 2 FCC Rcd. at 2699, ¶ 11 ("When making determinations as to whether certain speech is 'indecent,' we recognize and rely upon the Court's holding in *Pacifica* as setting forth the legal test for indecency."); *WGBH*, 69 F.C.C.2d at 1254, ¶ 10 ("We intend strictly to observe the narrowness of the *Pacifica* holding.").

Isolated or fleeting instances of offensive language rarely could meet this standard. No word was considered presumptively or *per se* indecent under this policy—even "fuck," see *Branton*, 6 FCC Rcd. at 610—so the only way that an offensive word could be deemed indecent was by reference to context, *i.e.*, if it was repeated or if other circumstances contributed to render its use the equivalent of "verbal shock treatment." *Indecency Policy Statement*, 16 FCC Rcd. at 8010, ¶ 20; see also Pet. App. 20a-21a (citing cases).[10] Numerous decisions accordingly refused to find expletives to be "indecent" if they were isolated or fleeting. *E.g.*, *Pacifica*, 2 FCC Rcd. at 2698-700, ¶¶ 3, 17-18 ("shit," "mother-fucker," "fuck"); *WGBH*, 69 F.C.C.2d at 1251, ¶ 2 ("shit," "bullshit"). In particular, the FCC displayed an appropriate sensitivity to context by declining to sanction fleeting, unintentional expletives during live broadcasts. *E.g.*,

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[10] *See also Pacifica*, 2 FCC Rcd. at 2699, ¶ 13 ("If a complaint focuses solely on the use of expletives, we believe that under the legal standards set forth in *Pacifica*, deliberate and repetitive use is a requisite to a finding of indecency."); *Infinity Broad. Corp.*, 2 FCC Rcd. at 2705, ¶ 7 ("Speech that is indecent must involve more than the isolated use of an offensive word.").

L.M. Communications, 7 FCC Rcd. at 1595 (single utterance of "mother-fucker" during live and spontaneous programming not indecent); *Lincoln Dellar*, 8 FCC Rcd. at 2585, ¶ 26 (single utterance of "fucked" not indecent because of "isolated and accidental nature of the broadcast"). Nevertheless, in recognition of the importance of context, the Commission acknowledged that there were rare cases in which even an isolated offensive word could be indecent, if the circumstances of its use were so egregious as to be patently offensive. *Indecency Policy Statement*, 16 FCC Rcd. at 8009-10, ¶ 19 (providing examples).

Petitioners' contrary suggestion—that under the FCC's old policy "a single vulgar expletive could not be found indecent, no matter how strongly other contextual factors weighed in favor of such a finding" Pet. Br. 17—is simply incorrect. Context has always been the touchstone of the FCC's indecency policy, with repetition being merely one aspect of that analysis. *E.g.*, *Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930, 932, ¶ 16 (1987) ("[T]he question of whether material is patently offensive requires careful consideration of context[, including] an analysis of whether allegedly isolated material is isolated or fleeting . . . ."), *aff'd in relevant part, rev'd in part sub nom. Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988). The FCC itself conceded in the order under review that "[w]e have long recognized that 'even relatively fleeting references may be found indecent' if the context makes them patently offensive." Pet. App. 85a. The FCC's change in the indecency policy has nothing to do with harmonizing its approach to "context."

If anything, the new standard actually takes *less* account of context than did the old one. Under the

prior approach, a word would not be deemed indecent unless and until the Commission had undertaken an examination of the context in which it was presented, to decide whether it amounted to "verbal shock treatment." *Indecency Policy Statement*, 16 FCC Rcd. at 8010, ¶ 20. Under the new approach, in contrast, certain words (such as "fuck" and "shit") are presumed indecent unless the FCC can identify factors that in the view of a majority of the Commissioners mitigate the language's offensiveness. *See Golden Globe Awards Order*, 19 FCC Rcd. at 4979, ¶ 9. Context is thus no longer a necessary consideration in assessing whether an expletive is "indecent"; rather, it becomes relevant only if the broadcaster raises it as an affirmative defense. *See id.* at 4978, ¶ 8 ("[G]iven the core meaning of the 'F-Word,' any use of that word or a variation, *in any context*, inherently has a sexual connotation, and therefore falls within the first prong of our indecency definition.") (emphasis added).

The issue in this case thus is not whether context should be part of the indecency analysis—it always has been—but whether the FCC has adequately explained its decision to modify the definition of "indecent" by abandoning a standard limited to "verbal shock treatment" in favor of an indecency presumption that must be rebutted with specific mitigating circumstances. Invoking the supposed need for "contextual analysis" cannot justify this change.

2. The only rationale the FCC has offered that is logically relevant to its actual change in policy is the notion that the old standard did not adequately protect children from the "first blow" of inappropriate speech. Pet. App. 84a-85a. The "first blow" theory has become shorthand in this case for the FCC's view

that children should be shielded from hearing these words at all. Certain expletives, the FCC has said, can "enlarge[] a child's vocabulary in an instant," *id.*, and thus even isolated or fleeting uses of these words should be prohibited. Pet. Br. 25-26.

But, as the Second Circuit held, this explanation makes no sense in light of the FCC's actual policy. Pet. App. 25a-28a. First, it still begs the question; the FCC has never explained "why it ha[d] changed its perception that a fleeting expletive was not a harmful 'first blow' for the nearly thirty years between *Pacifica* and *Golden Globes*." *Id.* at 25a.[11] Equally important, the "first blow" theory posits that *any* exposure to improper language will cause harm to children, by expanding their vocabulary and introducing them to concepts beyond their emotional maturity. *Id.* Yet, the FCC has consistently acknowledged that it has no authority to ban *all* instances of offensive language, regardless of context. *Id.*

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[11] Indeed, the FCC's argument was derived from a passage in *Pacifica* in which the Court was addressing the very different question of the constitutional relevance of what it found at the time to be the broadcast media's "uniquely pervasive presence in the lives of all Americans." *Pacifica*, 438 U.S. at 748-49 ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."). In this analogy, the Court was not equating isolated words with "blows"; indeed, its opinion made clear that it was not considering whether the isolated use of potentially offensive words could be deemed to be "indecent" at all. Instead, the passage merely addressed the fact that, at the time of *Pacifica*, parents lacked the means to filter out broadcasts that might contain material they deemed objectionable for children—a fact that is no longer the case. *See infra* Part II.B.

In practice, the FCC has approved broadcasts that contain numerous expletives, even under its new policy. For example, the FCC has held that repeated uses of the words "fuck" and "shit" during the film *Saving Private Ryan* were not "indecent" because, in context, their use was necessary to "realistically reflect the soldiers' strong human reactions to . . . th[e] unspeakable conditions and the peril in which they find themselves." *Saving Private Ryan Order*, 20 FCC Rcd. at 4512, ¶ 14. It also held that an isolated use of the term "bullshitter" during *The Early Show* was not indecent because it occurred as part of a "*bona fide* news interview." Pet. App. 127a-28a. Children may have been present during the airing of either of these programs—particularly *The Early Show*, see J.A. 105—and would have been exposed to this language. Yet, the FCC found that the language in *Saving Private Ryan* and *The Early Show* was not indecent, while the same language in the *Billboard Music Awards* was. The only explanation offered for the divergent results in these cases was the different "contexts" in which the words at issue were used.

These "contextual" distinctions, however, are entirely lost on children. They cannot distinguish between the use of an expletive in a Shakespearean drama and in an awards show; either program presents the same risk of exposure. A child is just as likely to ask a parent "what fucking meant," J.A. 19, after hearing the word during *Saving Private Ryan* as after hearing it during the *Billboard Music Awards*.[12]

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[12] As the Second Circuit noted, the FCC conceded during oral argument that:

> a broadcast of oral argument in this case, in which the same language used in the Fox broadcasts was repeated multiple times in the courtroom, would "plainly not" be indecent or

Accordingly, the "first blow" theory, as an explanation, is irrational and simply has no fit with the FCC's actual policy as it is applied across numerous cases. While the "first blow" theory might explain a blanket ban on all expletives (which would be independently unconstitutional), it bears no "rational connection" to the FCC's current *ad hoc* approach. See *State Farm*, 463 U.S. at 52. Indeed, the notion that selectively draconian enforcement of § 1464 could be effective in achieving the goal of shielding children from ever hearing fleeting expletives is quixotic, given that children today are exposed to potentially offensive words from many sources other than broadcast television. *CBS, Inc.* v. *DNC*, 412 U.S. 94, 127 (1973) ("sacrifice [of] First Amendment protections for so speculative a gain is not warranted"). The notion that a child watching "South Park" on Comedy Central (carried by a cable television system) could or would distinguish that program from what he or she watches on an over-the-air broadcast channel (also carried by that very same cable system) is completely fanciful.

In this light, petitioners' revisionist use of "context" merely confuses the issue. The question here is not whether context is relevant to indecency but whether the "first blow" concept can justify the Commission's new policy of regulating fleeting expletives. If the goal is to protect children from the expansion of their

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> profane under its standards because of the context in which it occurred. The Commission even conceded that a rebroadcast of precisely the same offending clips from the two Billboard Music Award programs for the purpose of providing background information on this case would not result in any action by the FCC, even though in those circumstances viewers would be subjected to the same "first blow" that resulted from the original airing of this material.

Pet. App. 26a-27a.

vocabulary that accompanies exposure to even an isolated use of an offensive word, petitioners' argument that indecency must be gauged by context is simply not responsive.

3. The FCC's mantra of "context" is, in reality, a plea for unbridled discretion. The FCC is no longer restricting itself to cases of highly sexual, graphic and shocking material. Rather, under the guise of contextual analysis, it is picking and choosing among a wide variety of mainstream programming, with no discernible standards to guide its discretion or to inform broadcasters of the bounds of acceptable speech. Compare J.A. 71-74 ("fuck" and "shit" during the documentary *The Blues: Godfathers and Sons* indecent), with *Saving Private Ryan Order*, 20 FCC Rcd. at 4513, ¶ 16 ("fuck" and "shit" during the film *Saving Private Ryan* not indecent). The order under review is indicative of this approach, prohibiting isolated expletives uttered by awards recipients or presenters during live coverage of an awards program but not one said by an interview subject during a live morning show. Pet. App. 117a-22a, 125a-28a. There is simply no way for broadcasters to determine under this new standard whether and when language will be deemed indecent, and broadcasters have reacted by engaging in significant self-censorship. *E.g.*, *Saving Private Ryan Order*, 20 FCC Rcd. at 4508-09, ¶ 4 (noting that more than a quarter of ABC affiliates refused to broadcast *Saving Private Ryan*, "citing their uncertainty as to whether it contained indecent material [in light of recent] Commission indecency rulings"); see also Mike Musgrove, *Sinclair Puts 9/11 Show In Late-Night Time Slots*, Wash. Post, Sept. 2, 2006, at D1 ("Sinclair Broadcast Group . . . will delay airing a documentary about the terrorist attacks of Sept. 11, 2001 . . . to avoid the risk of incurring fines

from the Federal Communication Commission over indecent language.").

The risk is particularly great with respect to live programming, in which the FCC's new standard makes broadcasters responsible for words unexpectedly blurted out "with no opportunity for journalistic editing." *Pacifica Reconsideration Order*, 59 F.C.C.2d at 893, ¶ 4 n.1. Even when broadcasters employ expensive technology to try to prevent the inadvertent broadcast of potentially offensive words, there remains an irreducible risk that such words will be broadcast. See Second Circuit Joint Appendix, Vol. I, at A-329, A-337 (describing possibility of human error and unnecessary censorship). The prospect of stiff fines or other sanctions pressures broadcasters to forgo live coverage of events, reducing the immediacy and quality of programming available to the public. Indeed, the record before the FCC was replete with examples of how the new policy has jeopardized the viability of live broadcasting. See *id.* at A-324-25 (describing effects of new policy on live programming); *id.* at A-332-34 (describing effects of new policy on sports programming); *id.* at A-336-38 (describing effects of new policy on live entertainment programming); J.A. 251-53 (citing examples of programs that were self-censored, including some live programs).

In that regard, *Pacifica* does not support the FCC's use of "context," as that term is applied case-by-case. First, both the plurality and the concurring opinion in *Pacifica* made clear that the Court was not addressing "cases involving the isolated use of a potentially offensive word." 438 U.S. at 760-61 (Powell, J., concurring). If anything, *Pacifica* strongly implies that fleeting expletives generally cannot satisfy the definition of "indecent." *Id.* at 757;

see *Indecency Policy Statement*, 16 FCC Rcd. at 8010, ¶ 20 (adopting this view); *Pacifica*, 2 FCC Rcd. at 2699, ¶ 13 (same).

Equally important, petitioners misinterpret *Pacifica*'s references to "context." The plurality's discussion of "context" was concerned mostly with the time of the broadcast, the nature of the program, and its likely audience (particularly whether that audience included children). *Pacifica*, 438 U.S. at 750 (opinion of the Court). The Court has never endorsed the FCC's current conception of "context," in which it scrutinizes one mainstream show after another and makes essentially editorial or perhaps even moral judgments about whether isolated words were or were not necessary to an artistic or socially valuable message (on pain of multimillion dollar fines). Cf. *E. Educ. Radio*, 24 F.C.C.2d 408, 413, ¶ 13 (1970) (§ 1464 "does not mean . . . that the Commission could properly assess program after program, stating that one was consistent with the public interest and another was not. That would be flagrant censorship").

Where regulatory enforcement has such a clear and profound chilling effect on speech, it is especially important that the FCC provide a reasoned and compelling explanation for its enforcement policy and, of course, for any change in that policy. To date, it has not.

4. It is a measure of how far the FCC has strayed from what is constitutionally permissible that petitioners now argue that the new policy is necessary to adhere more closely "to the text of the governing statute, which prohibits the broadcast of '*any* . . . indecent . . . language,'" Pet. Br. 25. This argument is specious for two reasons. First, the assertion that, because 18 U.S.C. § 1464 prohibits

"any" indecent language, the FCC must regulate fleeting expletives assumes that fleeting expletives necessarily constitute "indecent . . . language," when in fact the statute says no such thing. 18 U.S.C. § 1464. The statute says only that, when language is deemed "indecent," any and all broadcasts of that language are prohibited. *Id.*; see also *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997). The statute does not define "indecent," and the word "any" sheds no light on its meaning nor explains the FCC's shift in policy.

More importantly, if *Pacifica* means anything, it emphasizes that the Constitution does not permit the FCC to read § 1464 as expansively as possible. Limiting the FCC's authority under § 1464 to cases amounting to "verbal shock treatment" is a vitally important check that ensures that the FCC stays within constitutional bounds and avoids chilling protected speech. That petitioners would read the term "any" in § 1464 as they would in an ordinary statute speaks volumes about the extent to which the FCC has lost sight of First Amendment values in this context.[13]

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[13] Petitioners' novel argument that the passage of the Broadcast Decency Enforcement Act of 2005 ("BDEA"), Pub. L. No. 109-235, 120 Stat. 491 (2006), supports the FCC's dramatic expansion of its indecency enforcement regime is meritless. Pet. Br. 26 n.4. The BDEA did nothing more than increase the penalties for indecency violations; that legislation never addressed the substantive scope of the FCC's indecency policy. The legislative history of the BDEA thus provides no basis for reinterpreting § 1464, especially given that "[t]he views of a subsequent Congress of course provide no controlling basis from which to infer the purposes of an earlier Congress." *Haynes* v. *United States*, 390 U.S. 85, 87 n.4 (1968). In all events, the FCC did not rely on this argument in its order and therefore cannot defend it based on the BDEA now. *Chenery*, 332 U.S. at 196.

* * * *

At base, petitioners miss the point. They refuse to acknowledge that the change in policy at issue is not a greater focus on "context" but a modification of the substantive definition of "indecent," adopting a presumption that certain words are inherently indecent absent mitigating circumstances, and jettisoning their past sensitivity to the particular context of spontaneous and unexpected utterances during live broadcasts. None of the reasons offered by the Commission in its order explains or justifies this new approach. The Commission's policy, and the order under review, are therefore "arbitrary and capricious" under the APA.

C. The Other Justifications To Which The Order Under Review Made "Passing Reference" Do Not Justify The FCC's New Policy.

Attempting to give the FCC the benefit of the doubt, the Second Circuit also considered other possible justifications for the newly expanded indecency policy to which the FCC made "passing reference" in the *Remand Order*. Pet. App. 29a. Petitioners now attack the Second Circuit's analysis of two of those additional, possible justifications—concerning the FCC's failure to identify what harms the new policy is meant to address and whether non-literal uses of the words at issue can be indecent—but both of these arguments lack merit.

1. The FCC has yet to explain adequately what harms its new policy is intended to address. The closest petitioners come is their claim that the FCC's third reason for changing its policy was to avoid creating a "blanket exemption" for isolated expletives, which would allow "broadcasters to air expletives at

all hours of a day so long as they did so one at a time." Pet. Br. 26, 37. It should be emphasized at the outset that this would not be a justification for changing the substantive indecency standard itself, because the FCC would still have to justify why a one-at-a-time expletive was indecent. But even as an explanation of the "harm" the new policy is meant to address, the claim is meritless for several reasons.

Most fundamentally, the FCC has not come to grips with what the First Amendment requires. The FCC's new policy punishes much more speech than the old policy did. In such circumstances, the FCC must demonstrate that the harm it seeks to remedy through its change in direction is real, not merely conjectural or speculative. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 664 (1994). The FCC also must show that its change in course will in fact remedy the problem it has identified. *Playboy*, 529 U.S. at 819-23, 825. The FCC's new policy imposes restrictions on a broader range of protected speech, leading to far greater self-censorship. The First Amendment (as well as the APA) requires the FCC to identify, with specificity, the benefits to society that justify these costs.[14]

The FCC has not even tried to carry its burden on this point. In the order under review, the FCC claimed that it had not changed its policy—thus

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[14] *See* J.A. 251-53 (detailing recent examples of self-censorship); cf. *Pacifica Found.* v. *FCC*, 556 F.2d 9, 17 & n.19 (D.C. Cir. 1976) (prior to the FCC's promises of restraint, the *Pacifica* court of appeals observed that the FCC's decision "would prohibit the broadcast of Shakespeare's *The Tempest* or *Two Gentlemen of Verona*" along with "certain passages of the Bible" and the "works of Auden, Becket, Lord Byron, Chaucer, Fielding, Greene, Hemingway, Joyce, Knowles, Lawrence, Orwell, Scott, Swift, and the Nixon tapes").

allowing it to assume that no new showing of harm was necessary because it could rely on previous conclusions in *Pacifica* and other cases. Pet. App. 79a-80a, 113a; *id.* at 22a & n.6. Now that it has been forced on appeal to concede that it has changed its policy, the FCC argues that harm to society from fleeting expletives "has already been presumed by Congress," because "Congress's intent [to prohibit fleeting expletives] is clear." Pet. Br. 40.

This claim borders on the frivolous, and nothing in the cases petitioners cite supports the FCC's claim that it may simply "presume" harm from fleeting expletives. See Pet. Br. 40-41. Certainly *Pacifica* provides no such support, given that the Court emphasized that it was not even reaching the question whether the FCC had the authority to regulate isolated words. *Ginsberg* involved obscenity, not indecency, and the Court recognized that it was unnecessary to base obscenity regulation on a showing of harm or "antisocial consequences" because obscene speech, unlike indecent speech, is "not protected expression." *Ginsberg* v. *New York*, 390 U.S. 629, 641 & n.9 (1968). *ACT III* did not assess the government's interest in regulating isolated expletives but instead merely accepted that the government had a sufficiently compelling interest in regulating speech that the court assumed was equivalent to "hard-core pornography." *Action for Children's Television* v. *FCC*, 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc) ("*ACT III*"). Moreover, both *Ginsburg* and *ACT III* involved constitutional challenges to speech regulations, and the quantum of evidence required to defend a statute from a constitutional challenge differs from that demanded of an expert agency obligated to "examine the relevant data and articulate a satisfactory

explanation for its action." *State Farm*, 463 U.S. at 43.

Thus, the Second Circuit correctly faulted the FCC for an order that was "devoid of any evidence that suggests that a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation." Pet. App. 32a. As the court of appeals held, the *Remand Order* "provides no reasoned analysis of the purported 'problem' it is seeking to address with its new indecency policy from which this court can conclude that such regulation is reasonable." *Id.* at 32a-33a (citing cases). Contrary to petitioners' suggestion, such a showing is a critical prerequisite to any expansion of the ban on indecent speech.

Equally important, the Second Circuit correctly found that the FCC's concern that broadcasters' use of isolated expletives might increase unless restrained by FCC sanctions is not supported by the record. Pet. App. 30a. In the *Remand Order*, the FCC worried that, unless isolated and fleeting expletives were deemed to be indecent, broadcasters could "as a matter of logic" air offensive words one at a time, all day long. But there was no *evidence* in the record to give credence to that concern: as the Second Circuit noted, the FCC admitted that broadcasters had "never barraged the airwaves with expletives even prior to *Golden Globes*." *Id.* at 30a. More tellingly, the FCC conceded in the *Remand Order* that, even though broadcasters are free to air expletives during the indecency safe harbor between 10 p.m. and 6 a.m., broadcasters very rarely air such language. *Id.* at 86a-87a.[15]

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[15] Although Judge Leval suggested that broadcasters might increase the use of expletives because of a desire to compete

Nor can petitioners supply new evidence here to try to bolster what they now claim is a "predictive judgment" instead of a mere "matter of logic." Pet. Br. 38. Such evidence violates the cardinal principle that agency decisions must be evaluated "solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Chenery*, 332 U.S. at 196.[16]

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with cable networks not subject to indecency regulation, Pet. App. 56a-57a, the FCC has never suggested that this is the case, and there was nothing in the record to support Judge Leval's speculation. *See id.* at 30a n.11 (argument barred by *Chenery*, 332 U.S. at 196). Indeed, if such pressure to compete with cable in the use of the words "fuck" and "shit" really existed, one would expect to hear such words frequently after 10:00 p.m. on broadcast stations today; after all, there is nothing to stop the networks from airing shows like the "The Sopranos" (or even more graphic programming) during the safe harbor. In fact, however, the broadcast of such words during the safe harbor is extremely rare. *Id.* at 86a-87a.

[16] Even if the studies now cited by petitioners could properly be considered, they would not substantiate the FCC's worry about an increase in offensive language like "fuck" and "shit." Both of the studies cited by petitioners concluded that "offensive" language had increased on broadcast television only by counting milder words that the FCC has expressly held are not indecent. *Compare* Barbara K. Kaye & Barry S. Sapolsky, *Watch Your Mouth! An Analysis of Profanity Uttered by Children on Prime-Time Television*, 7 J. Mass. Commc'n & Soc'y 429, 435 (2004) (counting, *e.g.*, "hell" and "damn"), *and* Parents Television Council, *The Blue Tube: Foul Language on Primetime Network TV* 2 (2003), *available at* http://www.parentstv.org/PTC/publications/reports/stateindustrylanguage/stateoftheindustry-language.pdf (counting, *e.g.*, "hell" and "damn"), *cited in* H.R. Rep. No. 109-5, at 2 (2005), *with* J.A. 137 (finding "hell" and "damn" not indecent), *and Complaints By Parents Television Council Against Various Broad. Licensees*

In truth, broadcast stations are much like newspapers that seek a very wide audience; although the First Amendment protects the *Washington Post*'s right to print the word "fuck" on every page of its paper every morning, there is plainly no imminent possibility that it will begin to do so (even though it competes, in some sense, with much racier print fare). As the Second Circuit concluded, the FCC simply has not identified any real-world "problem" that would justify the FCC's expanded prohibition on indecency. *State Farm*, 463 U.S. at 41-42.

2. Likewise, there was no error in the Second Circuit's remand to reconsider whether non-literal uses of the words at issue are indecent. Pet. Br. 33. Although considerable ink has been spilled on this topic, petitioners correctly recognize that this issue is largely beside the point here. In particular, petitioners concede that they are *not* relying on this point as a justification for the FCC's change in policy. *Id.* at 23-26. Rather, as petitioners note, whether non-literal uses of the word "fuck" have a sexual connotation is relevant only to the question of whether such uses fall within "the first part of the two-part indecency test"—*i.e.*, whether the utterance at issue constitutes a reference to "sexual or excretory organs or activities" in the first place. *Id.* at 33. Petitioners thus candidly acknowledge that even if

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Regarding Their Airing of Allegedly Indecent Material, 20 FCC Rcd. 1931, 1938 ¶ 8 (2005) (finding words including "hell" and "damn" "do not represent graphic descriptions of sexual or excretory organs or activities such that the material is rendered patently offensive by contemporary community standards for the broadcast medium"). The studies cited by petitioners therefore do nothing to bolster the FCC's concern that broadcasters will suddenly abandon their own editorial standards and begin broadcasting the words "fuck" and "shit" one at a time throughout the day.

everything the FCC and Judge Leval have said about the linguistics of the word "fuck" is correct, the FCC is still left with the task of justifying its change of policy with regard to the second prong of the indecency standard—*i.e.*, whether the material is "patently offensive."

With respect to *that* issue, petitioners admit that whether the word is used literally or non-literally is an important factor in determining whether the utterance satisfies the "patently offensive" prong of the indecency test. Pet. Br. 36-37. There is no dispute in this case that, prior to the FCC's adoption of its new policy, isolated uses of the word "fuck" or "fucking" in a non-sexual manner would almost never be sanctioned—*i.e.*, such uses are not "explicit" or "graphic," they do not "dwell on" descriptions of sexual activities, nor are they "pandering" or "titillating." *Id.* at 22-23; *Indecency Policy Statement*, 16 FCC Rcd. at 8003, ¶ 10. Accordingly, even assuming, as the FCC asserts, that non-literal uses of the word "fuck" always have a sexual connotation and thus fall within the first part of the test, the agency still must explain why it has changed the second part of the test such that it can sanction non-literal "fleeting expletives" that do not amount to "verbal shock treatment."[17]

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[17] Respondent agrees with the Second Circuit that the FCC lacked any record evidence for its new view that every non-literal use of words like "fucking" or "bullshit" constitutes a reference to sexual or excretory organs or activities. In fact, the FCC's recent approach to words derived from scatological or sexual roots has been wildly inconsistent. *See, e.g.*, *NBC Telemundo License Co.*, 19 FCC Rcd. 23025 (2004) ("ass" and "crap" not indecent); *Complaints by Parents Television Council Against Various Broad. Licensees Regarding the Airing of Allegedly Indecent Material*, 20 FCC Rcd. 1920 (2005) ("dick," "dickhead," "pissed," and "ass" not indecent); *Complaints by*

In any event, the Second Circuit correctly found that the FCC's statement that it had to ban non-repeated, non-literal uses of the words "fuck" and "shit" because it is "difficult (if not impossible)" to distinguish literal from non-literal uses defies common sense. Pet. App. 29a. No reasonable person would have any difficulty concluding that the quoted statements from Bono, the President, and the Vice-President were non-literal. *Id.* at 29a-30a. On remand, the agency simply must reevaluate whether any change in policy can be justified on the basis of its extremely implausible assertion that it is impossible to distinguish the literal from the non-literal.

II. THE FCC'S CURRENT INDECENCY REGIME IS UNCONSTITUTIONAL.

In their petition for certiorari, petitioners contended that the decision of the court of appeals conflicts with this Court's constitutional holding in *Pacifica*, Pet. 15-19, and that this case warrants further review because the court of appeals predicted that the FCC could not "adequately respond to the constitutional . . . challenges" raised below, *id.* at 27 (quoting Pet. App. 45a). Yet having invoked the constitutional dimensions of this dispute at the certiorari stage, petitioners' brief on the merits now strenuously insists that the Court cannot consider those issues at all. Pet. Br. 42-43.

There is good reason for (and much irony in) petitioners' evasiveness—any examination of the

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Parents Television Council Against Various Broad. Licensees Regarding Their Airing of Allegedly Indecent Material, 20 FCC Rcd. 1931 (2005) ("dick," "crap," "pissed" not indecent); J.A. 98-105, 132-36, 143-45 ("dick," "dickhead," "ass," and "pissed off" not indecent).

constitutional issues in this case would reveal that the FCC's current indecency regime is patently unconstitutional, and for more than one reason.[18] There is little question that the evolution of the contemporary media marketplace since the time of *Pacifica* has eroded the essential premises of that decision. Technological developments, like the advent of the V-Chip, now provide less restrictive alternatives to the FCC's content-based regulation of speech. And, the inherent indeterminacy of the FCC's current approach to broadcast indecency is unconstitutionally vague—a conclusion that follows directly from this Court's rejection of an almost identically framed indecency standard in *Reno*, 521 U.S. 844.

A. The Evolution Of The Contemporary Media Marketplace Has Eroded *Pacifica*'s Essential Premises.

In *Pacifica*, this Court recognized the FCC's authority over non-obscene broadcast speech based on two key features of 1970's-era broadcast television, but sweeping technological and cultural changes have since eroded both of the foundations on which *Pacifica*'s holding depended.

First, while the broadcast media may have enjoyed "a uniquely pervasive presence in the lives of all Americans" in 1978, *Pacifica*, 438 U.S. at 748 (opinion of the Court), that is no longer so in 2008. A central feature of this "unique pervasiveness" was the fact that "broadcasting—unlike most other forms of

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[18] Respondent NBC addresses the First Amendment issues posed by the FCC's indecency regime in more detail. No point would be served by parroting that presentation. Thus, the First Amendment analysis here is intended to emphasize arguments that warrant particular focus.

communication—comes directly into the home . . . ." *Id.* at 759 (Powell, J., concurring); *see also id.* at 748-49 (opinion of the Court). In today's media marketplace, however, the great majority of households invite television signals into their homes through cable or satellite subscription services. Pet. App. 106a-07a (noting that almost 86% of television households subscribe to cable or satellite service). The number of households that principally rely on cable or satellite to receive television programming is only expected to increase in 2009 when broadcasters abandon the analog spectrum and convert to digital signals. See Seth Sutel, *Digital-TV switch boon for business*, Seattle Times, Feb. 19, 2008, at E2, *available at* 2008 WLNR 3350789.

In other words, the vast majority of Americans today watch broadcast stations side by side with hundreds of cable channels that are not bound by the FCC's indecency rules. Given the array of alternative media now available to the average consumer and the variety of roles these alternative media play, it is simply no longer the case that broadcasting has a "*uniquely* pervasive presence in the lives of all Americans." *Pacifica*, 438 U.S. at 748 (opinion of the Court) (emphasis added).

Second, broadcasting is no longer "uniquely accessible to children." *Id.* at 749. Children today can just as easily obtain access to indecent material through cable or satellite television or the Internet as they can through broadcasting. As more and more traditional audio and video content is delivered by means of the Internet, broadcasting will become even less unique in its accessibility to children.

Given the myriad media platforms available, it is unlikely that the FCC's indecency regulations will significantly advance the FCC's asserted interest in

shielding children from indecent material. When the government acts to restrict speech, the First Amendment requires that the measures at issue "in fact alleviate [the identified] harms in a direct and material way." *Turner Broad.*, 512 U.S. at 664. A restriction on speech violates the First Amendment when it "provides only the most limited incremental support for the interest asserted." *Bolger* v. *Young Drug Prods.*, 463 U.S. 60, 73 (1983). See also *FCC* v. *League of Women Voters*, 468 U.S. 364, 396 (1984) (finding regulation of broadcast speech that provides ineffective or remote support for the government's purpose is invalid).

These technological and cultural changes have eroded *Pacifica*'s two rationales for permitting content-based regulation of indecent broadcast speech. Given that all of the relevant trends are undermining the foundations of *Pacifica*, the FCC plainly has no justification for *expanding* its regulation of indecency beyond the bounds recognized in 1978.

B. New Technologies Like The V-Chip Provide Less Restrictive Alternatives To The FCC's Content-Based Regulation Of Protected Speech.

Today, a wide range of new technologies permit viewer control over television programming that simply did not exist in 1978 when *Pacifica* was decided. The vast majority of viewers receive television service through multichannel providers, like cable TV or satellite service, that offer their own parental control technologies. Digital video recorders permit viewers to build their own lists of "approved" programming. Most importantly, the V-Chip enables broadcast television viewers to block objectionable or "indecent" programming from entering their homes.

FCC, *V-Chip: Viewing Television Responsibly* (updated July 8, 2003) ("*V-Chip Information*"), *available at* http://www.fcc.gov/vchip. The V-Chip allows parents to use a standardized rating system to pre-set their televisions to block the content of programming and ensure that their children are not exposed to potentially offensive language or other content they may deem inappropriate.

The availability of the V-Chip renders the FCC's content-based regulation of indecent speech on broadcast television unconstitutional. Content-based restrictions on broadcast programming, such as bans on "indecent" materials, are constitutional only if they are "narrowly tailored." *Reno*, 521 U.S. at 879. To be "narrowly tailored," a regulation must represent the "least restrictive" means to address the relevant governmental interest. *Playboy*, 529 U.S. at 811-15. In other words, out of all available alternatives for satisfying the government's objective, the approach chosen must restrict the least amount of speech. *Id.* "[I]f a less restrictive means is available for the Government to achieve its goals, the Government *must* use it." *Id.* at 815 (emphasis added); see *Turner Broad.*, 512 U.S. at 641-42; *Pacifica*, 438 U.S. at 748 (opinion of the Court); see also *League of Women Voters*, 468 U.S. at 395, 398-99. Further, the First Amendment does not demand that an alternative to a content-based regulation be perfect or immune from criticism in order for it to constitute an effective, less restrictive alternative. *See Playboy*, 529 U.S. at 824; *Sable Communications*, 492 U.S. at 128.

Applying these principles, this Court has repeatedly invalidated complete bans on "indecent" speech when technological alternatives allow consumers to block offensive speech from entering

their homes. *Id.* at 126; *Playboy*, 529 U.S. at 815; *Ashcroft* v. *ACLU*, 542 U.S. 656, 666-67 (2004). Indeed, this Court has already suggested that the V-Chip is a feasible and effective alternative to a ban on indecent speech. *Denver Area Educ. Telecomms. Consortium, Inc.* v. *FCC*, 518 U.S. 727, 755-56 (1996).

Although the FCC has contended that some programs might not be correctly rated, see Pet. App. 109a-10a, petitioners cannot on that basis simply dismiss the V-Chip as an effective alternative to a content-based ban on speech. This Court has made clear that the First Amendment does not demand that an alternative to a speech-restrictive regulation be perfect or absolutely impervious to assault or evasion:

> It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and *a court should not presume parents, given full information, will fail to act.*

Playboy, 529 U.S. at 824 (emphasis added); *see also Sable Communications*, 492 U.S. at 128 (fact that "enterprising youngsters could and would evade the rules and gain access to [indecent] communications" did not establish that rules were ineffective). The FCC has not established that the V-Chip is a systematically ineffective means of giving viewers control over what content comes into their homes—control that was not technologically available in 1978 when *Pacifica* was decided.

When the FCC can achieve its aims by providing consumers with the ability to block particular content they find offensive, without prohibiting the speech

itself or precluding others from willingly receiving it, the Constitution precludes a partial or total ban on the speech. *Ashcroft*, 542 U.S. at 667 ("Filters are less restrictive than [bans on indecent speech because they] impose selective restrictions on speech at the receiving end, not universal restrictions at the source."); see also *Playboy*, 529 U.S. at 814-15 ("[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protections can be accomplished by a less restrictive alternative."). Simply put, "[t]argeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests." *Id.* at 815. The V-Chip is less restrictive than a complete ban on "indecent" speech, and it is equally effective in protecting consumers and children; the FCC therefore "must use it." *Id.*

C. The FCC's Current Indecency Standard Is Impermissibly Vague.

The FCC's dramatic expansion of its indecency enforcement regime means that it is no longer limiting its indecency fines to truly shocking and outrageous content—*e.g.*, the George Carlin routine at issue in *Pacifica*. Rather, the FCC is now targeting an array of mainstream broadcasts that fall far short of "verbal shock treatment." See *Pacifica*, 438 U.S. at 757 (Powell, J., concurring). The FCC is not applying any predictable or even discernible standards but rather is picking and choosing which of these mainstream shows to punish based on wholly subjective notions of what is "patently offensive" according to an undefined "community standard for the broadcast medium," or whether the disputed material is "integral" to the message or artistic goals

of the program. The FCC simply has no business trying to make these distinctions: it is well-settled that the government cannot use such vague standards in regulating constitutionally protected speech. See, *e.g.*, *Reno*, 521 U.S. at 874; see also *Smith* v. *Goguen*, 415 U.S. 566, 573 (1974).

In *Reno*, this Court unanimously concluded that the indecency standard in the Communications Decency Act of 1996 ("CDA"), Pub. L. No. 104-104, 110 Stat. 133, was unconstitutionally vague. See *Reno*, 521 U.S. at 870-74. The CDA defined indecency as any "communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." *Id.* at 860 (quoting 47 U.S.C. § 223(d)). That definition, however, is almost word-for-word identical to the FCC's "indecency" standard, with all of the same elements:

> First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. Second, the material must be patently offensive as measured by contemporary community standards for the broadcast medium.

Pet. App. 71-72a. In *Reno*, this Court squarely held that such a broad restriction on speech is unconstitutional. 521 U.S. at 870.

When confronted with *Reno*, the FCC points to a different portion of that opinion, addressing a different issue, in which the *Reno* Court distinguished *Pacifica*. Pet. App. 104a. *Reno* was the first case involving the Internet to reach this Court, and the government there attempted to establish the principle that the Internet should be treated exactly

like broadcasting and therefore subject to regulation under *Pacifica*. *Reno*, 521 U.S. at 868. Although the Court rejected that specific argument, *id.* at 868-70, that holding had nothing to do with the separate question whether the content-based regulation of speech was unconstitutionally vague (an issue *Pacifica* did not address with respect to indecent broadcasting). Whatever the characteristics of the medium and the appropriate level of First Amendment scrutiny, vagueness is an independent constitutional doctrine, and no regulation—of any medium—is permissible if it fails to give speakers adequate notice of what can and cannot be said. According to *Reno*, the very terms the FCC uses in its indecency definition would "unquestionably silence[] some speakers whose messages would be entitled to constitutional protection." Pet. App. 38a.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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